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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1513

UNITED STATES OF AMERICA,

Appellant,

v.

PATRICIA ILENE CLARK, Guardian for
SHAWN D. CLARK and TRICIA D. CLARK,

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF CLAIMS

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF BARBARA JENKINS IN SUPPORT OF APPELLEE

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To the Honorable Chief Justice and
Associate Justices of the
Supreme Court of the United States:

Barbara Jenkins respectfully moves this Court, pursuant to Supreme Court Rule 42(1), for leave to file the accompanying brief in this matter as amicus curiae in

support of appellee. In support of this motion, Barbara Jenkins submits the following statement outlining her interests in the issues presented by this appeal:

1. Barbara Jenkins is the mother and next friend of Jeffrey Dale Hoffman, the recognized illegitimate child of a deceased federal employee. Because he did not live with his father, he was found ineligible by the Civil Service Commission for survivor annuity benefits pursuant to the provision which is the subject of this appeal, 5 U.S.C. § 8341(a)(3)(A)(iii). Through his mother, he then undertook a series of actions to assert his right, and that of other illegitimate children, to survivor annuity benefits.

2. First, Barbara Jenkins sought to intervene in the case then pending before the three-judge district court in the District of Columbia, *Proctor v. United States,* No. 76-436. She sought to intervene on behalf of a class of similarly situated individuals so that the constitutionality of the lived-with provision and the issue of retroactivity could be finally resolved for all members of the class. Although the motion to intervene was denied, the district court specifically requested her participation in the case as an amicus. She therefore filed a brief on the merits, and her attorneys argued the case along with the attorney for plaintiff Proctor before Judges MacKinnon, Green, and Parker.

3. After the *Proctor* decision, Jenkins filed a separate action in the district court for the District of Columbia, *Jenkins v. United States Civil Service Commission,* No. 78-317 (complaint filed February 24, 1978). She sought to bring the case as a class action, and it was so certified.

The government did not defend the constitutionality of the provision, and the district court ruled in favor of the plaintiff class. 460 F.Supp. 611, 612 (D.D.C. 1978). Since that time, amicus Jenkins has been attempting to devise an appropriate plan for implementation of the district court's orders and for the provision of retroactive benefits to members of the plaintiff class.

4. Defendant appealed the *Jenkins* decision and sought a stay. On June 7, 1979, the District of Columbia Court of Appeals stayed all further proceedings on the appeal until this Court's decision on this appeal.

5. With the consent of both parties, Barbara Jenkins filed a brief amicus curiae in *Clark* in May, 1979, urging affirmance of the decision below or dismissal of the appeal for want of a substantial federal question.

6. The decision in this appeal will directly affect amicus Jenkins' ability to complete her efforts to ensure that full benefits are made available to her son and to the children of other deceased federal employees who have been deprived of eligibility by the challenged provision.

7. Throughout the course of her efforts to resolve this issue, amicus has been represented by attorneys from the National Senior Citizens Law Center, who are experienced in issues involving government pension and benefit programs. They have appeared before this Court on numerous occasions as attorneys for amici, most recently representing the Gray Panthers in support of appellees' position in *Califano v. Yamasaki,* ___ U.S. ___, 47 U.S.L.W. 4765 (June 20, 1979).

WHEREFORE, Barbara Jenkins respectfully moves that the Court grant her leave to file the brief amicus curiae which accompanies this motion.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF BARBARA JENKINS

INTEREST OF AMICUS

A statement describing Barbara Jenkins' interest in this case is set forth in the preceding motion requesting leave to file this brief amicus curiae.

SUMMARY OF ARGUMENT

The jurisdiction of the Court of Claims to consider appellee's case is premised on the recognized power of that court to sever an unconstitutional provision from a statute, to read the statute without regard to the unconstitutional provision, and to make an award under the statute. The Court of Claims properly severed the lived-with provision from the Civil Service Retirement Act, as it represented only a subordinate aspect of that Act and its severance would not affect the operation of the statute. In light of this Court's presumption in favor of the extension of benefits when district courts enjoin the application of unconstitutional provisions which otherwise render a statute underinclusive, it is appropriate that the Court of Claims take similar action to ensure that benefits are paid to eligible recipients.

With the lived-with provision severed and read out of the statute, the Court of Claims could properly award benefits under the Civil Service Retirement Act. Any sovereign immunity which might exist is waived. The Court of Claims therefore had jurisdiction pursuant to 28 U.S.C. § 1491 to make the award to appellee. The award did not derive from the Constitution, but from the Act itself.

The lived-with provision conclusively bars illegitimate children who did not reside with the decedent from ever demonstrating dependency on the decedent and thus from ever obtaining benefits. Because it is a class of illegitimate children who are the subject of the discrimination, a more demanding level of scrutiny is applicable than would otherwise be applied to a legislative classification not based on illegitimacy. Assuming that one purpose of the Retirement Act is replacing support which is lost due to the death of the federal employee, the lived-with provision must fall to constitutional challenge because it does not substantially further that purpose. Indeed, several other federal courts, all of which have found the provision unconstitutional, have reasoned that it does not meet even the "rational basis" test.

The determination of unconstitutionality follows directly from this Court's decision in *Jimenez v. Weinberger*, 417 U.S. 628 (1974), in which a successful challenge was brought to a Social Security Act provision conclusively denying benefits to a class of illegitimate children who were not permitted to demonstrate dependency. Later decisions of this Court have not disturbed that decision, but have indicated only that a degree of "fine tuning" is required to permit intended beneficiaries to demonstrate their dependency. A previous panel of the Court of Claims and several district courts have carefully considered all but the most recent of this Court's applicable cases and have uniformly concluded that the lived-with provision is not sufficiently attuned to alternative considerations. The most recent Supreme Court cases do not alter this Court's previous evaluations and should not lead to a result different from those previously made.

Moreover, defendant's claim that the lived-with provision discourages fraudulent claims is similarly unconvincing. There is no evidence that the provision reduces the likelihood of spurious claims any more for resident than for non-resident children. The several other lower courts have concurred in this analysis, which follows directly from this Court's reasoning in *Jimenez*.

The conclusive denial of eligibility to a significant portion of those children whom survivor annuity benefits were intended to serve does not substantially further the purposes of the Act.

ARGUMENT

I.

THE COURT OF CLAIMS HAD JURISDICTION OVER THIS CASE

Defendant asserts that the Court of Claims lacked jurisdiction to consider the substantive issue. Specifically, the government argues that that court could not have invoked its ancillary relief powers to order the Commission to place Shawn and Tricia Clark on the annuity roles because it lacked the power to award a money judgment against the government and thereby had no ancillary power. (U.S. 17-18.) See *United States v. Testan*, 424 U.S. 392, 404 & n.7 (1976). The government contends that the Court of Claims was unable to award a money judgment for two reasons: first, because no provision of the Civil Service Retirement statute authorizes such a payment, and, secondly, because the doctrine of sovereign immunity forbids the award of money damages (U.S. 18-19).

Only the first of these contentions need, and should, be considered by this Court. If there is authorization for

the provision of a money award, then the Court of Claims was acting properly within its scope of authority in making the award and in exercising its ancillary powers. Sovereign immunity is not an issue, as the substantive right to a money award acts as a waiver of any immunity which might otherwise exist. *United States v. Testan, supra,* 424 U.S., at 400-401.

Conversely, if the Court of Claims was not empowered to order payment to plaintiffs, then, as the government argues, the court lacked jurisdiction over all plaintiffs' claims, including their request to be placed on the annuity roles. In that instance as well, there is no need to consider the impact of sovereign immunity, for the Court of Claims would be without jurisdiction.[1] Consequently, the only jurisdictional issue before this Court concerns the power of the Court of Claims to award benefits to individuals who have been, except for the existence of an unconstitutional provision, eligible from the first for those benefits.

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[1]The government's argument on the second point is premature—if relevant at all. A decision by this Court that the Court of Claims was not empowered to award money damages to the plaintiffs would not, as the government recognizes (U.S. 23-24), affect the right of these plaintiffs, and others similarly situated, to seek a remedy in the district court via *Jenkins v. United States Civil Service Commission,* 460 F.Supp. 611 (D.D.C. 1978). The *Jenkins'* remedy includes retroactive benefits, but the government may contest the provision of those benefits on appeal. In *that* context, where the court's jurisdiction is incontestable, it might be appropriate, though not correct in the view of amicus, to contend that sovereign immunity precludes the award of retroactive benefits. But that issue is for another court in another case to decide. Sovereign immunity is not at issue in this case. Rather, only the jurisdiction of the Court of Claims is at issue, and the applicability of sovereign immunity is not relevant to that determination.

The initial consideration concerns the issue of severability. Although the government never explicitly discusses that point, its contention that no statutory authorization exists for the award of benefits to the plaintiffs necessarily includes the argument that the lived-with provision is not severable from the remainder of the statute. The question of severability was raised directly by defendant, however, in its challenge to the Court of Claims' jurisdiction in this case's identical predecessor, *Gentry v. United States,* 546 F.2d 343, 345 (1976), *reh'g denied,* 551 F.2d 852 (1977) (hereinafter, "*Gentry I*" and "*Gentry II,*" respectively). In *Gentry I,* defendant argued, as it does here, that as there was no provision specifically requiring the payment of benefits to plaintiffs, the Court of Claims lacked jurisdiction; there is "not a claim for money presently due and owing, as prescribed by a statute or the Constitution." 546 F.2d, at 345. Since the challenged provision did not require the payment of benefits to the plaintiffs (and, indeed, specifically precluded payment to them), it could not be read as the authorization for payment of money presently due and owing. *Ibid.* The Court of Claims rejected this contention and determined that its constitutional obligations required it to ignore the constitutional portions of the statute, "giv[ing] effect to all of a statute that it can without transgressing the oath of loyalty to the Constitution . . . " *Id.,* at 346.

That court, concerned whether severability was appropriate in that instance, directed its attention to whether the remainder of the statute could properly stand alone. It noted correctly: "If the live-with requirement is not separable from the other language of the statute, this court has no jurisdiction to grant recovery to plaintiff,

whether the requirement is constitutional or not." *Id.*, at 347.[2]

The Court of Claims' inquiry in *Gentry I* provides a complete analysis of the propriety of severability in this case. "That the live-with requirement is severable from the annuity statute is evident from an analysis of the statute's dominant purpose." *Id.*, at 347. That purpose, the court saw, is the provision of benefits to dependent survivors. "[T]he live-with requirement creates but a minor exception," and, in fact, was only added to the statute "after the purpose of aiding dependents was fixed in the law, apparently as a reaction to a judicial construction of the statute." *Ibid.*

> "This sequence of enactment demonstrates the clearly subordinate and, if constitutionally offensive, dispensable position of the live-with requirement. *United States v. Jackson*, . . . 390 U.S. [570] at 586-591 . . . [1968]. Further, and very importantly here, the thrust of the 1956 amendments did not vary significantly from the then-existing statutory focus on dependency, retaining the beneficiary status of those illegitimates whom, according to defendant, Congress thought most likely to be dependent, *i.e.*, those living with the annuitant in a regular parent-child relationship at the time of his death. We conclude from the legislative design and history, and the purpose as articulated by defendant, that the live-with requirement is subordinate in importance to, and independent of, the dominant

[2]The Court of Claims found it necessary, in order to determine whether it had jurisdiction, to consider the issue of severability before considering the provision's constitutionality. 546 F.2d, at 347. Defendant has effectively recognized the propriety of this reversal of the usual order by raising the issue of severability, though obliquely, before defending the statute's constitutionality. Amicus is in agreement with this ordering of the issues.

> congressional purpose embodied in the statutory scheme, and thus severable from the remaining provisions of the scheme." *Id.*, at 347-348 (footnote omitted).

With the challenged provision severed from the rest of the statute, because of its unconstitutionality, the *Gentry* court awarded benefits to plaintiffs on the basis of the Retirement Act as constitutionally interpreted. Thus, the Court of Claims *was* awarding benefits as prescribed by statute: the Retirement Act itself provided a "substantive right against the United States for money damages," *United States v. Testan, supra,* 424 U.S., at 398. The Court of Claims consequently had jurisdiction pursuant to 28 U.S.C. § 1491. See also *Chambers v. United States,* 451 F.2d 1045, 1050-1051 (Ct. Cl. 1971), and cases cited therein.

The Court of Claims' ability to read the unconstitutional provision out of the statute (where severable) is identical, in all relevant aspects, to an issue which regularly arises in courts with broader remedial powers. In a federal district court, when an offending provision is declared unconstitutional and its further application enjoined, a similar analysis has been validated by this Court, most recently in *Califano v. Westcott,* ___ U.S. ___, 47 U.S.L.W. 4817, 4821 (June 26, 1979). In that case, the Court quoted from Justice Harlan's concurring opinion in *Welsh v. United States,* 398 U.S. 333, 361 (1970), concerning the propriety of nullification or extension when a statute is found defective because of underinclusiveness—the very failure of the provision here under attack. This Court noted that the usual course favors extension, and cited numerous cases, involving the Social Security Act and other statutes, in which this Court had either extended benefits on its own or

summarily affirmed that action by district courts. 47 U.S.L.W., at 4821; see, especially, *Jimenez v. Weinberger*, 417 U.S. 628, 637-638 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 691 & n.25 (1973) (plurality opinion). Implicit in these determinations is that the basis for the award—for the extension of benefits—is the statutory provision with its unconstitutional portion deleted as a result of the Court's conclusion, the same structural approach here employed by the Court of Claims.

In *Westcott*, this Court stated that "equitable considerations" supported the extension of benefits. Those same considerations support severability and extension in this instance; indeed, the two cases are closely parallel. The issue in *Westcott* was the constitutionality of the denial of AFDC-UF benefits to children in families in which the mother, not the father, was unemployed. This Court pointed out that nullification would result in the loss of these benefits to "approximately 300,000 needy children . . ., and an injunction suspending the program's operation would impose hardship on beneficiaries whom Congress plainly meant to protect." *Id.*, at 4821. Likewise, the probable Congressional intent in the Retirement Act was to assist dependent surviving children of deceased federal employees. See *infra*, at 23. To nullify the statute would have a disastrous effect on the overall provision of annuities to surviving dependent children. It would directly counter the intent of Congress.[3]

[3]As defendant points out (U.S. 21-22), there is no explicit severability provision in the Retirement Act comparable to that in the Social Security Act, 42 U.S.C. §1303, on which this Court placed partial support for extension. 47 U.S.L.W., at 4821 & n.8. The absence of such a provision, however, is not determinative of the propriety of severability; rather, the overall purpose of the survivor program and the live-with provision should be analyzed, as was done by the Court of Claims in *Gentry I*, to determine the propriety of severability.

In general, although this Court declined "to elaborate . . . the conditions under which invalidation rather than extension of an underinclusive federal benefits statute should be ordered," *id.*, at 4821, *Westcott* implies a presumption in favor of extension. Indeed, this Court stated that under the circumstances, it would only consider the issue "if the power to order extension were clearly beyond the constitutional competence of a federal district court," but given the "routine" affirmances of orders to that effect, "no such remedial incapacity exists." *Ibid.* Similarly, in the narrow context of this case, where a virtually identical issue, the propriety of the Court of Claims' decision to "read out" the offending provision, is under consideration, the same presumption should prevail. If, upon the enjoining of an unconstitutional provision, a district court can properly extend a benefit program to those previously excluded, it is equally appropriate that the Court of Claims, while incapable of issuing an injunction, should "extend" benefits to previously excluded beneficiaries by declining to consider the unconstitutional provisions. If the district court's decision in *Jenkins* were before this Court, rather than the *Clark* decision, the logic of *Westcott* and similar cases cited therein would undoubtedly result in an extension of benefits to this class. No legal or equitable reason exists for a different approach to the powers of the Court of Claims.[4]

[4]A situation identical to that in this case is created when a district court is asked to award benefits on the grounds that a provision is unconstitutional, but no request is made for declaratory or injunctive relief. In that instance, the district court is empowered to do exactly as the Court of Claims did in this instance: award benefits—and no more. In a seminal Social Security Act challenge, this Court recognized the propriety of that approach in

[footnote continued]

Indeed, the only argument which defendant makes to counter the analysis of the Court of Claims is that the *Gentry* court improperly relied on this Court's decision in *United States v. Lovett*, 328 U.S. 303 (1946), *aff'g* 66 F.Supp. 142 (Ct. Cl.) (U.S. 21, n.20), in support of severance. In *Lovett*, the Court of Claims considered a provision of an appropriations bill which specifically precluded payment for future services to four government employees whom Congress had determined were subversives. See 66 F.Supp., at 144. In the plurality opinion, the Court of Claims undertook the same initial inquiry as did that court in *Gentry:* whether the offending provision was severable from the remainder of the Act. *Id.*, at 144. Concluding that it was, the judges held that they were "in no doubt about our jurisdiction." *Ibid.* The concurring opinions indicated no concern about jurisdiction, and differed only in their conclusion that the challenged provision was unconstitutional. One judge, however, in language reminiscent of the *Gentry* court, indicated why a decision of unconstitutionality necessitated payment to plaintiffs:

> "And to whatever extent it is within the jurisdiction of a court to which the question is presented in litigation, to give judgment according to the Constitution, even though that requires the court

reviewing the district court's jurisdiction: "[The action] did not seek affirmatively to interdict the operation of a statutory scheme. A judgment for [plaintiff] would not put the operation of a federal statute under the restraint of an equity degree; indeed, apart from its effect under the doctrine of *stare decisis*, it would have no other result than to require the payment of [plaintiff's] benefits." *Flemming v. Nestor*, 363 U.S. 603, 607 (1960); see also *Myers v. Hampton*, No. 8682 (S.D. Ohio, Aug. 8, 1977) (district court did not enjoin application of "lived-with" provision, but declared it invalid and, explicitly following the analysis in *Gentry I*, read out the unconstitutional portion and awarded benefits).

> to disregard a statute which conflicts with the Constitution, the judges are bound by their oaths to give such a judgment. In this case, therefore, we must disregard [the challenged provision]." *Id.*, at 152 (Madden, J., concurring); see *Gentry I*, 546 F.2d, at 346.

On appeal, this Court did not even consider the jurisdictional issue. The only dispute was whether the offending section was unconstitutional. Through Justice Black, six members of the Court determined that it was a proscribed bill of attainder. They then affirmed the Court of Claims, holding that the offending section "does not stand as an obstacle to payment of compensation" to the plaintiffs. 328 U.S., at 318. In short, the Supreme Court accepted the Court of Claims' decision to read the offending provision out of the act.[5]

For purposes of this case, *Lovett* stands for the proposition that the Court of Claims has jurisdiction to consider money claims in situations where a provision of a statute explicitly forbids payment to the claimants if that provision is found unconstitutional and is properly severed. The entire five-member Court of Claims accepted the propriety of severability and the court's jurisdiction to render a money judgment. The Supreme Court accepted without discussion the Court of Claims' decision to sever and to take jurisdiction of the case, with the necessary result that a provision which explicitly forbade payment to the claimants was ignored so that the claim was compensable under the remaining portions of the statute. That is precisely the analysis of the Court of Claims in *Gentry*, and, necessarily, in the instant case.

[5]The two concurring Justices disagreed only in the majority's determination that the provision was unconstitutional. 328 U.S., at 330 (Frankfurter, Reed, JJ., concurring).

Defendant has not suggested that the *Lovett* holding should be overruled, but, rather, that *Lovett* is distinguishable on the grounds that the offending provision "was relevant only as a bar to payments to which the petitioners otherwise would have been entitled. Here, in contrast, [plaintiffs] have no claim against the government that is not based on the challenged statute." (U.S. 21, n.20.) This analysis, however, begs the question of severability. Illegitimate children, like their legitimate counterparts, *are* entitled to payments; but for the bar of the lived-with provision, they would receive payments. In fact, after the decision in *Visor v. United States,* Civ. No. 9922(2) (E.D. Mo., Feb. 12, 1955), and prior to the implementation of the lived-with provision in 1956 (see U.S. 28), other illegitimate children in the same situation did receive payments under the statute. In this respect they are no different from the *Lovett* plaintiffs, who had previously been reimbursed, but who were denied further payments solely because of the operation of an unconstitutional provision. In each instance, the deletion of the offending provision returns the statute to its previous propriety.

It is no argument that the *Lovett* claimants' entitlement was based on separate considerations, such as that they had worked for their pay. The parents of the illegitimate children affected by the lived-with provision also worked for that entitlement; retirement benefits, including survivor annuity benefits, are an incident to that work and the entitlement is no different. The entitlement to benefits existed at all times in both circumstances; only the insertion of a specific bar prevented payments. The removal of that bar, upon a determination of its unconstitutionality, requires payment to otherwise eligible individuals in each instance. Separating out

the offending provision, as the Court of Claims did in each instance, results in payment under still-existing provisions.

Section 1491 gives the Court of Claims jurisdiction over claims "founded . . . upon the Constitution . . . ." Defendant also argues that as this is a constitutional claim, there is no basis "for an award of money damages as a remedy for any unconstitutionality there may be in the statute." (U.S. 18.) Thus, defendant appears to be contending that plaintiffs are improperly looking to the Constitution as the basis for the payment of accrued benefits.

This contention again misses the mark. Amicus does not suggest that the Constitution serves as the triggering mechanism for the provision of benefits, but, only that the claim is a constitutional one and thereby properly before the Court of Claims pursuant to section 1491—which specifically permits such claims. The Act itself provides for the payment of benefits.

This Court has interpreted a narrower jurisdictional provision in a similar fashion. In *Weinberger v. Salfi,* 422 U.S. 749 (1975), the Court was faced at the outset with the propriety of district court jurisdiction over a constitutional challenge to a Social Security Act provision which excluded certain otherwise eligible individuals from coverage. The district court had found jurisdiction under the general federal-question provision, 28 U.S.C. § 1331, despite a specific prohibition forbidding jurisdiction under that section: "No action against the United States, the Secretary, or any officer or employee therefore shall be brought under [§ 1331] of Title 28 to recover on any claim arising under [Title II of the Social Security Act]." 42 U.S.C. § 405(h). Plaintiffs argued to this Court that the prohibition in section 405(h) was

inapplicable because it refers only to actions brought under Title II, not under the Constitution. This Court held to the contrary:

> "[I]t is . . . fruitless to argue that this action does not also arise under the Social Security Act. For not only is it Social Security benefits which [plaintiffs] seek to recover, but it is the Social Security Act which provides both the standing and the substantive basis for the presentation of their constitutional contentions. [Plaintiffs] sought . . . a judgment directing the Secretary to pay Social Security benefits. To contend that such an action does not arise under the Act whose benefits are sought is to ignore both the language and the substance of the complaint and the judgment." *Weinberger v. Salfi, supra,* 422 U.S., at 760-761.

Thus, this Court determined that a challenge to the constitutionality of the Social Security Act was, in fact, an "action" to "recover on [a Social Security] claim." *Id.*, at 762. Similarly, section 1491 permits plaintiffs to recover money damages on a challenge to the constitutionality of the Civil Service Retirement Act. The action arises under both the Constitution and the statute, but it is incorrect to contend that plaintiffs are looking to the Constitution as the source for their recovery of benefits. For not only is it Civil Service Retirement benefits which plaintiffs seek to recover, but it is also the Civil Service Retirement Act which provides both the standing and the substantive basis for the presentation of their constitutional contentions.

Consequently, the fact that benefits are sought pursuant to a constitutional challenge, rather than on a theory of administrative misinterpretation of the statute, is irrelevant for the purpose of determining the court's jurisdiction. The Court of Claims has jurisdiction to

consider whether payments should be made under the Act, and those payments are appropriately made when the challenged provision is deleted from the statute. In that situation, just as would have been the case in *Salfi* had plaintiffs prevailed, the claimants are receiving benefits under the Act.

This case was thus properly before the Court of Claims pursuant to 28 U.S.C. § 1491. Plaintiffs made a constitutional challenge, seeking benefits due them under the Civil Service Retirement Act. That Act provides for the payment of benefits to surviving children of deceased federal employees. Plaintiffs had not previously received those benefits because of the lived-with provision. That subsection is of minor importance to the overall purpose of providing benefits to surviving children; consequently, the Court of Claims properly severed it, as this Court has done and countenanced in similar circumstances. Once the lived-with provision was read out of the statute, the Court of Claims could properly award benefits under the Act. That court was enforcing a substantive right against the United States for money damages.

II.

THE "LIVE-WITH" PROVISION IMPERMISSIBLY DISCRIMINATES AGAINST ILLEGITIMATE CHILDREN.

A. A "substantial relation" test is applied to classifications based on legitimacy.

Amicus is in partial agreement with defendant's evaluation of the level of scrutiny applicable to classifications involving illegitimacy. (U.S. 25-27.) It should be emphasized, however, that the appropriate standard is more demanding than the "rational basis" test.

That the appropriate analysis in this action requires a middle level of scrutiny is abundantly evident from cases decided during the last term. Reviewing *Trimble v. Gordon,* 430 U.S. 762 (1977), this Court summarized the standard applicable to classifications based on illegitimacy: "Although . . . classifications based on illegitimacy are not subject to 'strict scrutiny,' they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests." *Lalli v. Lalli,* 99 S.Ct. 518, 523 (1978) (plurality opinion).

Echoing this intermediate standard of review have been the two most recent decisions in which discrimination based on illegitimacy was discussed. In *Parham v. Hughes,* 99 S.Ct. 1742, 1745 (1979) (plurality opinion), the Court noted that the presumption in favor of the constitutionality of a statute may be "undermined when a State has enacted legislation creating classes based upon certain other immutable attributes." Citing several cases in which "immutable attributes" had been the subject of classifications, the Court made reference to illegitimacy and gender, among others. The implication was that the standard applicable to classifications premised on illegitimacy is comparable to that for classifications based on sex. At a minimum, those classifications require something more than the least demanding scrutiny. See, *e.g., Califano v. Goldfarb,* 430 U.S. 199 (1977); *Craig v. Boren,* 429 U.S. 190, 197 (1977); *Parham v. Hughes, supra,* 99 S.Ct., at 1750 (Powell, J., concurring).

Finally, the issue was evaluated by both the majority and the dissent in *Califano v. Boles,* ___ U.S. ___, 47 U.S.L.W. 4874 (June 26, 1979). In his opinion for the majority, Justice Rehnquist carefully explained that the case did not involve discrimination against illegitimate children with the necessary result that the government

needed to show only a "rational relation" between the statute's goals and its operation. *Id.,* at 4876-4878. Implicit in the majority's reasoning is that a determination that illegitimacy was the premise for the classification would have warranted a more demanding scrutiny, as the district court had concluded. *Id.,* at 4876. Four members of the Court in dissent were explicit on this point: "If . . . the statute benefits children [as opposed to mothers], then it incorporates a distinction based on legitimacy which must be tested under the more rigorous standard of *Jimenez v. Weinberger,* 417 U.S. 628 (1974), and *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972)." *Id.,* at 4878.

Amicus does not intend to belabor a point which has received extensive briefing before, and consideration by, this Court. Her intention is only to rebut the government's emphasis that less than the strictest scrutiny should be applied. Equally true is the important converse: more than the least demanding scrutiny must also be applied. The appropriate level of analysis requires, at a minimum, that the statute bear a *substantial* relation to the permissible governmental interests it is designed to serve. *Lalli v. Lalli, supra,* 99 S.Ct., at 524. Defendant cannot make that showing.[6]

B. The conclusive denial of benefits to non-resident illegitimate children is not substantially related to the Act's purposes.

The constitutionality of the lived-with provision has now been considered on numerous occasions and defendant's arguments have been unanimously rejected in each

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[6]Indeed, it is unlikely that the lived-with provision can pass even the least demanding scrutiny under the rational relation test. See *Proctor v. United States,* 448 F.Supp. 418, 426 (D.D.C. 1977) (3-judge district court).

instance.[7] Defendant offers no new arguments in its most recent brief on the issue and does not assert some of its earlier contentions.[8] It rests finally on the same basic two arguments which have been offered in all of the previous cases, with the only new element being this Court's decision in *Lalli v. Lalli, supra*, which was not available for consideration by the lower courts. Nothing in *Lalli*, however, nor in any of defendant's previous arguments, supports the constitutionality of the lived-with requirement. Decisions of this Court, especially when read in conjunction with the several lower court decisions invalidating the provision, indicate that the Court of Claims' decision below was correct.

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[7]The decision by the Court of Claims below means that a total of eleven federal judges, sitting on four courts, have considered the substantive issue eight times and have agreed with plaintiffs on every occasion. *Myers v. Hampton*, No. 8682 (S.D. Ohio, Sept. 18, 1973), *rem'd* 427 U.S. 909 (1976) ("*Myers I*"); *Gentry v. United States*, 546 F.2d 343 (Ct. Cl. 1976), *reh'g denied* 551 F.2d 852 (Ct. Cl. 1977); *Myers v. Hampton*, No. 8682 (S.D. Ohio, Aug. 8, 1977) ("*Myers II*"); *Tenny v. United States*, 441 F.Supp. 224 (E.D. Mo. 1977); *Proctor v. United States*, 448 F.Supp. 418 (D.D.C. 1977) (3-judge district court); *Jenkins v. United States Civil Service Commission*, 460 F.Supp. 611 (D.D.C. 1978). Judge Bennett of the Court of Claims sat on both the *Gentry* and *Clark* cases. Judge Skelton of the Court of Claims, while joining in the *Gentry* result, initially did not find the statute unconstitutional, 546 F.2d, at 356-357; by not filing a separate opinion on defendant's rehearing request, however, he appears to have agreed with the majority's determination of unconstitutionality. It is worth noting as well that four justices of this Court voted to affirm the original *Myers* decision even after the decision in *Mathews v. Lucas*, 427 U.S. 495 (1976). See 427 U.S. 909.

[8]Defendants previously argued that this Court's decision in *Mathews v. de Castro*, 429 U.S. 181 (1976), provided support for their arguments. But after that argument was repeatedly rejected, see *Gentry II, supra*, 551 F.2d, at 853-855; *Myers II, supra*, Sl. Op., at 7-8; *Tenny, supra*, 441 F.Supp., at 228; *Proctor, supra*, 448 F.Supp., at 423-424, defendant has apparently decided no longer to press that contention.

Defendant argues initially that the purpose of the Civil Service Retirement Act in general, and the provision of benefits to children in particular, was "to replace support lost by the wage-earner's dependents when he dies." (U.S. 27; footnote omitted.) Although amicus believes that that issue is not so easily resolved as defendant claims (and that, as the Court of Claims contends, the purpose may well have been to provide benefits to all survivors regardless of dependency, see *Gentry I, supra*, 546 F.2d, at 353; *Gentry II, supra*, 551 F.2d, at 854-855), it will here be assumed, without admitting, that the purpose of the Act is as the government contends. See *Proctor, supra*, 448 F.Supp., at 421 & n.1.[9] In the remainder of this brief, therefore, amicus will demonstrate why the conclusive denial of survivor's benefits to illegitimate children who did not live with the federal employee prior to his death does not substantially further the alleged purpose of providing benefits to dependents of federal employees.

The "lived-with" provision results in an extension of benefits to all surviving children of a federal employee "save for those of his illegitimate issue who did not reside in his home." *Gentry I, supra*, 546 F.2d, at 348. These children are conclusively forbidden from ever demonstrating dependency on the decedent. Thus, two different classifications are created. First, children are classified at their parent's death according to their legitimacy; all legitimate children, regardless of whether

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[9]A determination that the purpose of the residency requirement was to provide benefits without regard to dependency would not lead to a different result, and would involve only a slightly different analysis. See *Gentry I, supra*, 546 F.2d, at 353-354; *Gentry II, supra*, 551 F.2d, at 854-855; *Proctor, supra*, 448 F.Supp., at 421 n.1.

they were living with the decedent and/or were dependent upon him for their support, are automatically eligible for benefits without any further showing. *Id.*, at 348. Second, illegitimate children are classified at their parent's death on the basis of whether or not they lived with the parent. If they did, they automatically are eligible for survivor annuity benefits; if they did not, they are forever barred from obtaining benefits, regardless of whatever showing of dependency they might be able to make. *Id.*, at 348-349. Viewed alternatively, the classification is made on the basis of legitimacy or illegitimacy of those children who did not live with the decedent. The legitimate children are automatically eligible, and the illegitimate children are automatically ineligible, both without any further showing. *Tenny, supra,* 441 F.Supp., at 226. However the classificatory structure is framed, though, the simple fact remains that certain illegitimate children are conclusively denied benefits which are available to legitimate children and that the excluded children are given no opportunity under the statute to demonstrate their dependency and entitlement to benefits. The fact that a subset of illegitimate children is also eligible does not avoid the basic nature of the discrimination, which is one premised on legitimacy. The cases all accept that conclusion, and, indeed, defendant does not argue that the issue here is other than a classification based on illegitimacy. Compare *Califano v. Boles,* ___ U.S. ___, 47 U.S.L.W. 4874, 4877-4878 (June 26, 1979).

Defendant's main argument in support of this classificatory scheme is that it furthers the legislative purpose "by providing a ready method of identifying those illegitimate children most likely to have lost support." (U.S. 27.) Under this rationale, the fact of having lived

with the federal employee is viewed as probable evidence that the child was dependent on him, and it is therefore appropriate that the lost support be replaced. Conversely, this approach assumes both that illegitimate children not living with the decedent were not supported by him and that legitimate children in the same position were.

Presented with this argument, the lower courts have repeatedly pointed to the Supreme Court case most directly on point, *Jimenez v. Weinberger,* 417 U.S. 618 (1974). That case involved a Social Security Act provision authorizing benefits for the children of disabled workers. As in this case, "[t]he government maintained and the Court agreed that the overall purpose of the statutory scheme was to channel financial support to children actually dependent on the disabled workers . . . ." *Proctor, supra,* 448 F.Supp., at 420-421. All legitimate children automatically were eligible for benefits, and illegitimate children born before their parent's disability began were eligible if they could demonstrate dependency through any of several showings, including either having lived with, or having received support from, the decedent. In contrast, illegitimates born after the onset of the disability, unless they fit into certain statutory exceptions, were precluded from demonstrating dependency. Like the illegitimate children in this case, they were conclusively barred from eligibility.

Defendant offered virtually the same rationale for that scheme as is offered in this case: "The Secretary maintains that the Act denies benefits to [certain] afterborn illegitimates . . . because it is 'likely' that these illegitimates, as a class, will not possess the requisite economic dependency on the wage earner which would entitle them to recover under the Act . . . ." *Jimenez v. Weinberger, supra,* 417 U.S., at 634. This Court was unconvinced by

that argument. The statute was considered overinclusive since it provided benefits for some illegitimate children who were not dependent. "Conversely, the Act is 'underinclusive' in that it conclusively excludes some illegitimates . . . who are, in fact, dependent upon their disabled parent . . . . [T]o conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws . . . ." *Id.*, at 637.

Recognizing the similarity to *Jimenez*, see, *e.g.*, *Gentry I*, 546 F.2d, at 351; *Proctor, supra*, 448 F.Supp., at 421, the courts which have considered the issue of this case have relied significantly on that decision. Thus, they have repeatedly held that the challenged classificatory scheme was invalid under this Court's reasoning in *Jimenez:*

> "No good reason appears, in light of the purpose of financially assisting those most probably dependent, for differentiating between potentially dependent but nonresident illegitimates, on the one hand, and resident illegitimates along with resident and nonresident legitimates, on the other. The classification of illegitimates, as embodied in the live-with requirement, is not justified by the basic legislative purpose." *Gentry I, supra*, 546 F.2d, at 351; see also *Myers II, supra*, Sl. Op., at 5-6; *Tenny, supra*, 441 F.Supp., at 227; *Proctor, supra*, 448 F.Supp., at 424-425.

Defendant has consistently challenged these arguments, however, contending that *Mathews v. Lucas*, 427 U.S. 495 (1976), not *Jimenez*, should control the outcome of this issue. The statutory scheme in *Lucas* presumed financial dependency for all legitimate and some illegitimate children, while other illegitimate children were required to prove dependency. 427 U.S., at 497-499.

Defendant argues that this case meets the requirements set out in *Lucas* by which "'the likelihood of actual support [is] suggested by a narrow set of objective and apparently reasonable indicators,' even though the indicators may not be precisely accurate." (U.S. 31-32, quoting in part from *id.*, at 516.) But, as before, defendant ignores the salient characteristic of *Lucas*, which distinguishes it from *Jimenez:* the conclusive denial of benefits in the latter case "is absent here, for . . . an otherwise eligible child may qualify for survivorship benefits by showing contribution to support or cohabitation, at the time of death." 427 U.S., at 512 (citations omitted). The statute here challenged, like that in *Jimenez*, is conclusive in its denial of benefits, regardless of the child's ability to demonstrate support by the decedent.

The lower courts have recognized the distinction between *Lucas* and *Jimenez*. See *Gentry I, supra*, 546 F.2d, at 352; *Myers II, supra*, Sl. Op., at 5-6; *Proctor, supra*, 448 F.Supp., at 422; *Tenny, supra*, 441 F.Supp., at 228. In *Proctor* the three-judge court carefully detailed the additional guidance provided by *Lucas:*

> "*Lucas* represents a useful refinement of the *Jimenez* opinion . . . . *Lucas* established that the decisive constitutional requirement in such cases is a fair opportunity for plaintiffs to demonstrate, *before being rejected conclusively for benefits*, that they are in the class of people the statute is designed to serve." 448 F.Supp., at 423 (emphasis supplied).

The court further noted that "*Lucas* and *Jimenez* indicate that when a government program aiding dependents of workers is involved, illegitimate children must be given an opportunity to show dependency." *Id.*, at 424. Noting that this Court elaborated on the *Lucas* concept of

"fine tuning" in *Trimble v. Gordon, supra,* 430 U.S., at 772, the court concluded that the existence of only one criterion by which to measure dependency was insufficient to meet constitutional requirements. "[C]ohabitation with one's parent does not correlate reliably with economic dependency upon one's parent." *Proctor, supra,* 448 F.Supp., at 425. Other factors, such as those available to evaluate dependency in the *Lucas* situation, must be considered as well; had they been, these children would have been found dependent. *Ibid.* In short, the challenged provision "discriminates between legitimates and illegitimates without the fine tuning such a sensitive distinction requires." *Id.*, at 426.

This Court should view the situation similarly. The illegitimate children are forever barred from proving dependency, like those in *Jimenez* and unlike those in *Lucas,* regardless of its existence in fact. This is not merely the unfortunate, but necessary result of the drawing of categorical lines, as defendant argues. (U.S. 31.) This is, instead, the deprivation of large numbers of dependent children by a statute, the purpose of which, as defendant contends, is to assist dependent children. A considerable segment of the population for whom the benefits were designed has thus been deprived of eligibility because of the operation of a provision which lacks the requisite sensitivity.[10] Differential treatment

[10]Although defendant claimed that it could not provide figures as to the number of otherwise eligible illegitimates denied benefits because of the operation of the lived-with provision as requested by amicus in discovery in *Jenkins,* the parties did compile some estimates. It was stipulated that the number of illegitimate children denied benefits because of the operation of the lived-with provision from fiscal 1972 through fiscal 1977 was between 10,347 and 22,241. The court accepted this stipulated estimate in an order dated August 22, 1978. In the Commission's Financial and

[footnote continued]

of legitimate and illegitimate children is not per se forbidden, but when some of the latter are permanently barred from demonstrating that they are among those whom the statute was intended to benefit, that discrimination rises to the level of unconstitutionality. It simply cannot be said that a statute which deprives a significant segment of intended beneficiaries from demonstrating eligibility bears a substantial relation to the purpose of the Act.

Defendant's only argument not placed before other courts is that the *Lalli* decision supports the single criterion approach.[11] (U.S. 33-34.) But the plurality's *Lalli* opinion does no more than provide the obverse of *Trimble;* no new point of law was announced. Instead, the Court merely upheld the use of an "evidentiary" requirement that paternity be established prior to death if the child is to inherit from his father. The key difference between *Lalli* and the instant situation is that

Statistical Data for Fiscal Year 1977, the Commission listed a total of 68,937 children added as survivor annuitants for the six-year period of 1972-1977. Table B-6. It should be evident, therefore, that the lived-with provision has conclusively deprived a huge class of otherwise-eligible beneficiaries, its size ranging from 15.0% of the existing child recipients to 32.3%. The lived-with provision, thus, cannot be viewed as a mere classificatory measure with certain unfortunate results for a uniquely situated few. Rather, it affects a significant portion of those whom the Act is intended to serve.

[11]*Trimble v. Gordon, supra,* 430 U.S., at 770-771, in which this Court first noted that a statute might employ "a middle ground between the extremes of complete exclusion and case-by-case determination," and from which the decision in *Lalli* flows, see 99 S.Ct., at 524, was considered in *Proctor,* and, implicitly, by the Court of Claims in the decision below. The *Proctor* court concluded that *Trimble* did not alter the outcome, as it only reiterated the importance of "alternative considerations." 448 F.Supp., at 425.

the provision in the former does not act in a wholesale fashion to disenfranchise the very people who should be eligible. The *Trimble* statute was invalidated for that reason, 99 S.Ct., at 527, but the statute in *Lalli* does not "inevitably disqualif[y] an unnecessarily large number of children born out of wedlock." *Ibid.* This Court noted that its focus must be on whether the challenged "statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment." *Ibid.* In *Lalli,* the evidentiary requirement did not have that effect. But in *Trimble* and the instant case, where children are forbidden from demonstrating the very factor (dependency) which motivates the operation of the statute, that rationality is lacking.

Lalli only further explores the concepts previously announced in *Trimble* and *Lucas.* The basic premise of those cases, that fine tuning is required, has not been altered. The lived-with provision lacks that necessary element.

Defendant also argues that the lived-with provision allows a more efficient administration of the Act and discourages fraudulent claims. The same claim was made in *Jimenez.* See 417 U.S., at 634. The contention there was that "evidence of parentage or support may be fabricated," *id.,* at 636, while in the instant case, the government argues that evidence that a child has been recognized may either be "ambiguous" or "fabricated." (U.S. 35.) The lived-with requirement, defendant argues, provides easier identification of eligible beneficiaries. But this Court rejected that approach in *Jimenez, supra,* 417 U.S., at 636:

> "It does not follow, however, that the blanket and conclusive exclusion of [plaintiffs'] subclass of illegitimates is reasonably related to the prevention of spurious claims . . . . [I]t would discriminate between the two subclasses of afterborn illegitimates without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses."

That the same problem exists in the instant situation was first recognized in *Gentry I.* The court held that the potential for spurious claims was the same for both residents and nonresidents, just as in *Jimenez.* 546 F.2d, at 351-352. Quoting from plaintiff's brief in *Gentry,* the Court of Claims notes that children might well be living with a man not their natural father, and that the mother might make a claim, at his death, that they were his children. *Id.,* at 351-352. While it may well be true, as defendant asserts, that "[e]vidence that the child was living with the wage-earner at his death is less likely to be ambiguous and is harder to fabricate," (U.S. 35), that is no answer to the question whether a resident will be more unlikely to file a spurious claim than a non-resident. The Court of Claims concluded that the lived-with provision simply did not accomplish its purported goal. *Accord, Tenny, supra,* 441 F.Supp., at 227; *Proctor, supra,* 448 F.Supp., at 425.

In short, the contention that the provision avoids spurious claims is simply incorrect. Residents and nonresidents are in the same position to make false claims: "The legislative goal of preventing spurious claims of parentage is no more promoted by the live-with requirement than it was by the banning of after-born illegitimates in *Jimenez.*" *Gentry I, supra,* 546 F.2d, at 351. While it may be true that the evidentiary problems for nonresidents is greater, "it does not follow . . . 'that the blanket and conclusive exclusion of [plaintiff's]

subclass of illegitimates is reasonably related to the prevention of spurious claims.'" *Id.*, at 351, quoting in part from *Jimenez, supra,* 417 U.S., at 636. What gains in efficiency are affected by the conclusive exclusion of nonresident illegitimate children are more than offset by the wholesale denial of eligibility to those individuals for whom the benefits were designed. Simplification of evidentiary problems alone cannot serve as "an impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez v. Perez,* 409 U.S. 535, 538 (1973). Thus, the government argues that *Lalli* supports classifications which encourage efficiency (U.S. 35), but ignores that the provision at issue there adversely affected only a small number of those otherwise eligible, 99 S.Ct., at 527, which is the standard and acceptable result of classificatory schemes. In the instant case, however, an entire class of individuals for whom the benefits were intended are forever excluded from demonstrating eligibility. Efficient administration of the program cannot provide a sufficient rationale for disenfranchisement of the Act's intended beneficiaries.

The lived-with provision must fail because it does not substantially further its purpose, which is, by the government's own contention, to replace support lost due to the death of the federal employee. It not only results in the payment of benefits to nondependents, but also specifically and finally denies benefits to a significant subclass of dependent illegitimate children. Even if the former inadequacy can be ignored, the latter is sufficient to seal the statute's fate. The three-judge court in *Proctor* summarized this ultimate failing in this manner:

> "The matter boils down to this: given that the overall purpose of the statute is to aid dependents of federal employees, and given that the 'character

> of the discrimination' here revolves around use of a single criterion to determine the dependency of illegitimates, and given that the relationship between the discriminatory factor and the statutory purpose must survive an analysis of intermediate intensity, does imposition of this single criterion upon illegitimates deprive them of the equal protection of the laws? This Court decides that it does. In this day and age, cohabitation with one's parent does not correlate reliably with economic dependency upon one's parent, as any consideration of the number of divorces and separations involving the once-married will show." 448 F.Supp., at 425.

The lower courts, ranging from single judges to three-judge panels of the Court of Claims and of a district court, have consistently and adamantly rejected the arguments offered here by defendant.[12] This Court has itself recognized the impropriety of the conclusive exclusion of illegitimates who were in fact dependent in *Jimenez,* and has emphasized the need for a degree of "fine tuning" as explained in *Lucas, Trimble,* and *Lalli.* In light of these decisions, a provision which utilizes only one criterion for demonstrating dependency by illegitimate children and otherwise conclusively precludes such a demonstration cannot bear a substantial relationship to the purposes of the Retirement Act. Indeed, it is so tenuous that not even a rational basis for the provision exists. "Much less could the relationship in question withstand a more demanding level of scrutiny." *Proctor, supra,* 448 F.Supp., at 426.

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[12] Indeed, the first judge to consider the issue found so little merit in the government's contention that he refused to convene a three-judge district court, deciding instead to "accept the invitation extended to a single district judge in *Bailey v. Patterson,* 369 U.S. 31 (1962) . . . to declare a statute unconstitutional where any defense would be clearly frivolous." *Myers I,* Sl. Op., at 2.

CONCLUSION

For all of the reasons outlined above, amicus urges the affirmance of the decision of the Court of Claims.

Respectfully submitted,

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